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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

DONALD OKADA

Plaintiffs,

vs.

BANK OF AMERICA, N.A.; SELECT  
PORTFOLIO SERVICING;  
NATIONAL DEFAULT SERVICING  
CORPORATION; and DOES 1-50, I

Defendants.

Case No. 8:15-CV-00981-CJC-E

**OPPOSITION TO  
DEFENDANT BANK OF  
AMERICA'S MOTION TO  
DISMISS COMPLAINT  
PURSUANT TO FEDERAL  
RULE OF CIVIL PROCEDURE  
12(B)(6)**

Date: August 3, 2015

Time: 1:30 PM

Place: Courtroom 9B

Courtroom: 15

Honorable Cormac J. Carney

Plaintiff Donald Okada ("Okada") respectfully submit the following  
Memorandum of Points and Authorities in opposition to Defendants' Motion to Dismiss  
Plaintiff's First Amended Complaint.

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## I. INTRODUCTION

Plaintiff Okada opposes Defendant Bank of America, NA (“BANA” or “Defendant”) attempt to dismiss Okada’s Complaint (“Compl.”). BANA contends that Plaintiff’s complaint is not supported by sufficient facts despite the complaint’s exhaustive references to dates, individual names, and representations made by numerous agents on behalf of all business Defendants named in the complaint. In short, BANA asserts that (1) Okada failed to state a claim upon which relief can be granted [Fed. Rule Civ. Proc. 12(b)(6)]; (2) the Complaint fails to adequately allege any misrepresentation, scienter, or damages and fails to allege BANA owes Okada a duty; (3) Okada fails to allege that Homeowners Bill of Rights Provisions were triggered because Okada did not submit a complete application; and (4) that Okada’s Business and Profession’s Code section 17200 (“UCL”) claim fails because Okada lacks standing and does not allege injury or actionable conduct; and (4) the defects are such that they are incurable and the Complaint is incapable of amendment.

Despite BANA’s misleading assertions, careful review of the case law and complaint’s details reveal a misguided attempt by BANA to delay impending discovery and deny Okada a valuable principal reduction opportunity available to Okada through the NMSP.

## II. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

On November 15, 2006, Okada obtained a \$1,610,000.00 loan (“Loan”) to refinance real property located at 316-316 ½ Iris Avenue, Newport Beach, CA 92625 (“Property”). The property is secured by a Deed of Trust identifying Okada as the borrower, Countrywide as the lender, ReconTrust Company, N.A. (“ReconTrust”) as trustee, and Mortgage Electronic Registration Systems, Inc. (“MERS”) as the beneficiary under the Deed of Trust.

On August 5, 2011, ReconTrust recorded a Notice of Default (“NOD”) listing

1 Okada's arrears as \$184,128.46. On November 10, 2011, ReconTrust, recorded a Notice  
2 of Trustee's Sale ("NOTS") listing the total unpaid balance of \$1,843,641.14.

3 On January 11, 2013, Okada filed a Complaint ("2013 Complaint") alleging  
4 wrongful foreclosure actions against BANA, ReconTrust Countrywide Home Loans,  
5 Inc., and the Bank of New York Mellon.

6 On or about March 2013, Plaintiff entered into settlement discussions concerning  
7 the 2013 Complaint. On March 7, 2013, BANA's counsel, Mr. Andres Orphanopolous  
8 indicated to Okada that BANA determined that Okada qualified for a modification of his  
9 loan under the National Mortgage Settlement Program ("NMSP"). Compl. ¶ 22 (See  
10 Exhibit A). On March 19, 2013, Mr. Orphanopolous assured Okada that BANA would  
11 not foreclose provided that Plaintiff was being considered for a modification under the  
12 NMSP. (See Exhibit B).

13 Okada relied on Mr. Orphanopolous' representations on behalf of BANA that  
14 they would consider him for the NMSP modification and dismissed the lawsuit on  
15 March 25, 2013. Compl. ¶ 23.

16 On March 23 and 28, 2013, Okada submitted **all required documents** for the  
17 NMSP to BANA. Comp ¶ 24-26. The submitted documents were filed well within the  
18 March 31, 2013 deadline expressed in BANA's letter. (See Exhibit A).

19 Inexplicably, on June 6, 2013, Okada received a letter dated May 24, 2013  
20 indicating Okada withdrew his NMSP application on May 21, 2013. (See Exhibit C).

21 On June 10, 2013, Okada delivered a letter via certified mail to BANA indicating  
22 to BANA that he did not withdraw his NMSP application and requested that his  
23 application be reinstated. Compl. ¶ 31.

24 On June 17, 2013, Okada spoke with a BANA representative that he never  
25 withdrew his application and that he submitted all required document under the NMSP.  
26 The unnamed representative explained that she did not understand why his application

1 was removed from consideration. Compl. ¶ 32.

2 On June 25, 2013, Okada resubmitted his application with additional documents  
3 in order to update the application as required by the NMSP application. Comp. ¶ 33.  
4 The purpose of the resubmission application was to insure its completeness.

5 On June 27, 2013 Okada spoke with Ms. Winona Petersen, BANA's  
6 representative. Ms. Petersen indicated to Plaintiff that additional documents were  
7 requested in order to complete the NMSP application. Okada sent the requested  
8 documents that same day. Compl. ¶ 34.

9 On July 9, 2013, Okada spoke with Ms. Carol Bedford BANA's representative.  
10 Ms. Bedford asked for additional documents. Okada provided those additional  
11 documents that same day by mail and by fax on July 11, 2013. Compl. ¶ 35.

12 On July 17 2013, Okada sent additional documents explaining an issue with his  
13 pay stubs. Compl. ¶ 36.

14 On July 22, 2013, Okada spoke with Ms. Nikki McRae, BANA's representative, in  
15 order to verify receipt of Okada's documents. Ms. McRae indicated that she would  
16 follow up with Okada on July 31, 2013. Compl. ¶ 38.

17 On July 30, 2013, Okada spoke with Ms. McRae who indicated to Okada that  
18 BANA needed a utility bill and that this would be the last document required for  
19 underwriting the NMSP and Okada would be provided with a decision in 2 weeks.  
20 Compl. ¶ 39. Okada did submit the final utility bill that same day.<sup>1</sup>

21 On August 20, 2013, Okada spoke with Krista, BANA's representative, and Krista  
22 informed Okada that the account had been transferred to Defendant Select Portfolio

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It's important to note that the complaint fails to mention that it was submitted that day. But Plaintiff requests leave of court to file an amended complaint if necessary to allege that Plaintiff submitted the final utility bill on July 30, 2013. However, to the extent that it can be surmised on the face of the complaint that a completed application was filed, Okada requests a denial of BANA's motion to dismiss.

1 Servicing (“SPS”). Compl. ¶ 41.

2 Despite Okada’s requests to be reviewed under the NMSP after submission of a  
3 **complete application**, both SPS and BANA fail to review Okada under the NMSP.

4 On January 1, 2015, the NMSP expired. Okada cannot qualify under the NMSP  
5 program because BANA transferred servicing of Okada’s loan to SPS and SPS  
6 consistently delayed reviewing Okada’s NMSP application. Compl. ¶ 55.

7 On February 27, 2015, National Default Servicing Corporation records a notice of  
8 default on Okada’s home. Compl. ¶ 56.

9 On May 11, 2015, Plaintiff filed the instant complaint alleging six causes of action  
10 against BANA, SPS, and National Default Servicing Corporation (“NDSC”), for: (1)  
11 False Promise (2) Negligent Misrepresentation (3) Civil Code Violations § 2923.6,  
12 2924.10, and 2924.18. (4) and violation of the UCL.

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### **III. LEGAL STANDARD**

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#### **A. Fed. R. Civ. P. 12(b)(6)**

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17 Fed. R. Civ. P. 12(b)(6) (“Rule 12(b)(6)”) provides that a party may move to  
18 dismiss a complaint based on “failure to state a claim upon which relief can be granted.”  
19 A motion to dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the  
20 claims alleged.<sup>2</sup> If the plaintiff does not nudge his claims across the line from  
21 conceivable to plausible, the plaintiff’s complaint must be dismissed. *Bell Atlantic*  
22 *Corp. v. Twombly*, 540 U.S. 544, 570 (2007). The Court does not require heightened fact  
23 pleading of specifics, but only enough facts to state a claim to relief that is plausible on  
24 its face. *Id.* A claim has facial plausibility when the plaintiff pleads factual content that  
allows the court to draw the reasonable inference that the defendant is liable for the

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*See Parks Sch. of Bus. v. Symington* 51 F.3d 1480, 1484 (9<sup>th</sup> Cir. 1995)

1 misconduct alleged.<sup>3</sup>

2 The Ninth Circuit stated in *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (2009), that a  
3 court must also take all allegations of material fact as true and construe them in the light  
4 most favorable to the non-moving party, although “conclusory allegations of law and  
5 unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal.” The  
6 analysis for Rule 12(b)(6) is not whether a plaintiff will ultimately prevail, but whether  
7 the claimant is entitled to offer evidence to support the claims advanced in his or her  
8 complaint.<sup>4</sup>

9 A court granting a motion to dismiss a complaint must then decide whether or not  
10 to grant leave to amend. Fed. R. Civ. P. 15(a) (“Rule 15(a)”) provides that plaintiffs may  
11 amend its pleading once as a matter of course subject to certain restrictions. Rule  
12 15(a)(2) specifically provides that “...a party may amend its pleading only with the  
13 opposing party's written consent or the court's leave. The court should freely give leave  
14 when justice so requires.”<sup>5</sup> “...the grant or denial of leave to amend is within the  
15 discretion of the District Court, but outright refusal to grant the leave without any  
16 justifying reason appearing for the denial is not an exercise of discretion; it is merely  
17 abuse of that discretion and inconsistent with the spirit of the Federal Rules.” *Id.*

18 Furthermore, a Plaintiff may file an amended complaint adding additional causes  
19 of action where “allowing such amendment will in no way impede the efficient  
20 resolution of the issues already raised by the Plaintiff’s prior cause of action, nor are  
21 Defendants in any way prejudiced in their defense by the amendment.” *Graybeal v.*

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4 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

5 *Diaz v. International Longshore and Warehouse Union, Local 13*, 474 F.3d 1202,  
1205 (9<sup>th</sup> Cir. 2007)

*See Foman v. Davis* 371 U.S. 178, 182 (1962)

1 *American Sav. & Loan Assoc.*, 59 F.R.D. 7, 21 (D.D.C. 1973).

2 **B. Judicial Notice**

3 “A court may take judicial notice of ‘matters of public record’ without converting  
4 a motion to dismiss into a motion for summary judgment,” as long as the facts noticed  
5 are not “subject to reasonable dispute.”<sup>6</sup> Defendants requested the Court to take judicial  
6 notice of several documents. While Plaintiffs do not dispute that these documents exist,  
7 the Court should not accept Defendants’ *interpretation* of what each of the document  
8 signify, including but not limited to the allegations that all the signatures in the  
9 documents are genuine and valid, all the entities in the documents are legitimate and  
10 true, and that the transfer of rights are legitimate and valid.

11 **IV LEGAL ARGUMENT**

12 **A. Okada’s claim for False Promise<sup>7</sup> and Negligent Misrepresentation**  
13 **adequately alleges, misrepresentation, scienter, reliance, and damages.**

14 To state a claim for fraudulent misrepresentation – both intentional and negligent  
15 – the plaintiff must allege: (1) a misrepresentation; (2) knowledge of falsity; (3) intent to  
16 defraud, *i.e.*, to induce reliance; (4) justifiable reliance; and (5) resulting damage.<sup>8</sup> Fed.  
17 R. Civ. P. 9(b) (“Rule 9(b)”) requires that these facts be alleged with particularity.<sup>9</sup>

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*Intri-Plex Techs., Inc. v. Crest Group Inc.*, 499 F.3d 1048, 1052 (9<sup>th</sup> Cir. 2007)

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The cause of action “False Promise” is derived from California Civil Jury Instructions 1902. Cal. Civ Code § 1710 outlines four kinds of “deceit” and the name “False Promise” is derived from the 4<sup>th</sup> type of deceit which is a “promise without any intention of performing it.” See CACI Instruction 1902. It is a form of intentional misrepresentation.

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*Lazar v. Superior Court*, 12 Cal. 4<sup>th</sup> 631, 49 Cal.Rptr.2d 377, 909 P.2d 981 (1996)

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*In re Glen Fed. Sec. Litig.*, 42 F.3d 1541, 1547-49 (9<sup>th</sup> Cir. 1994)

Negligent misrepresentation is a fraud-based claim and also requires pleading with particularity.<sup>10</sup> The elements of a negligent misrepresentation claim are the same as those for a claim of fraudulent misrepresentation, except that there is no requirement of an intent to induce reliance. The misrepresentation must concern a past or existing fact. *Id.*

Rule 9(b) states: “in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. *Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally*” (emphasis added). Thus, the Ninth Circuit has held that “while a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the circumstances of the fraud must be stated with particularity is a federally imposed rule.”<sup>11</sup> In other words, “averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.”<sup>12</sup> “The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.”<sup>13</sup>

**1. Okada pleads a plethora of details which ground Okada’s False Promise and Negligent Misrepresentation claims.**

In BANA’s motion to dismiss, BANA contends Plaintiff’s complaint *does not*

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<sup>10</sup> *Samson v. One West Bank*, U.S. Dist. LEXIS at \*3 (N.D. Cal. July 28, 2011)

<sup>11</sup> *Vessa v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9<sup>th</sup> Cir. 2003)

<sup>12</sup> *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9<sup>th</sup> Cir. 2009)

<sup>13</sup> *Johnson v. Aurora Bank, F.S.B.*, 2015 U.S. Dist. LEXIS 36140 at 30. (N.D. Cal Mar. 23, 2015)

1 *allege* “what misrepresentations were said, the individual’s authority to make a  
 2 representation, or whether the misrepresentation was made with the *intent to defraud*.”  
 3 (See BANA’s Motion P. 6 lines 2-4). Furthermore, BANA contends that Okada failed to  
 4 allege misrepresentations of reliance and damages.

5 But the face of the complaint *clearly spells out these circumstances*. On March 7,  
 6 2013, Mr. Andres Orphanopolous, the attorney representing BANA, informed Okada  
 7 that BANA determined Okada qualified under the NMSP and Okada potentially  
 8 qualified for reduced principal on his loan. Comp ¶ 22. Further, Mr. Orphanopolous  
 9 assured Okada no foreclosure activity would take place provided Okada was under  
 10 consideration for the NMSP. Compl. ¶ 22. Okada relied on these representations and  
 11 dismissed his lawsuit. Compl. ¶ 23. Okada received a letter from BANA falsely  
 12 accusing Okada of withdrawing his application on June 10, 2013. Compl. ¶ 27. As  
 13 instructed by BANA representatives, Okada submits numerous documents and whole  
 14 NMSP applications in order to insure review under the NMSP. Comp. ¶’s 25, 26, 33,  
 15 34, 39. Finally, on July 30, 2013, Ms. McRae, BANA’s representative, indicates to  
 16 Okada BANA’s underwriters required a utility bill and that once received from Okada,  
 17 BANA would provide Okada a decision on the NMSP application in 2 weeks. Compl. ¶  
 18 39. Okada did submit the document but the servicing was transferred from BANA to  
 19 SPS. Compl. ¶ 41. BANA’s loan servicing transfer to SPS and SPS’s subsequent delay in  
 20 reviewing Okada’s NMSP application resulted in the expiration of the NMSP program  
 21 on January 1, 2015, additional costs, late servicing fees, and a failure to obtain possible  
 22 principal reduction on Okada’s loan. Comp ¶’s 61-63. And finally, despite Okada’s  
 23 submission of a complete application, National Default Servicing Corporation filed a  
 24 notice of default on February 27, 2015. Compl. ¶ 56.

25 The complaint is replete with details, dates, names and representations made by  
 26 BANA representatives regarding Okada’s NMSP application. To characterize the

1 complaint as legal conclusions with no factual support is false.

2 While BANA contends the complaint does not specify knowledge of BANA's  
3 state of mind, the law requires only a general allegation of BANA's intent. BANA's  
4 acceptance of Okada's application, BANA falsely accusing Okada of withdrawing the  
5 application, and BANA's loan servicing transfer to SPS creates a strong inference  
6 BANA intended to deny Okada an opportunity to modify his loan under the NMSP.

7 **2. BANA completely mischaracterizes Okada's complaint as one wholly**  
8 **lacking in detail or reason.**

9 First, BANA does not understand why Okada "waited six months from  
10 withdrawing the Complaint and submitting Okada's loan modification."<sup>14</sup> The facts  
11 behind the Complaint directly contradicts this assertion. Okada dismissed his lawsuit on  
12 March 25, 2013. Compl. ¶ 23. Okada submitted all his NMSP documents on March 23,  
13 2013 and March 28, 2013 Compl. ¶ 25-26.

14 Second, BANA contends it never caused Okada to dismiss his case. BANA  
15 ignores Mr. Orphanoplous' representations that induced Okada to dismiss his case.  
16 BANA states that Plaintiff's "legal relations changed due to Plaintiff's own conduct."<sup>15</sup>  
17 But this assertion completely ignores Mr. Orphanopolous' and BANA's offers to review  
18 Okada under the NMSP and that while Okada was being reviewed, Okada would not be  
19 under threat of foreclosure. Okada relied on these representations and abandoned his  
20 lawsuit to pursue the offered NMSP modification.

21 Third, BANA contends that Okada submitted loan modifications to SPS after they

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14 *See BANA's Motion to Dismiss P. 8 Lines 4-5*

15 *See BANA's Motion to Dismiss P. 8 Lines 8-9*

1 were service released to BANA.<sup>16</sup> And this is where BANA's whole motion to dismiss  
 2 argument lies. BANA grounds this contention by refusing to acknowledge Okada's  
 3 NMSP application submissions on March 23 and March 28. Instead, BANA, *without*  
 4 *any basis*, informed Okada that he withdrew his application and delayed the process.  
 5 Compl. ¶ 31. Okada submits another "complete application" on June 25, 2013. Compl.  
 6 ¶ 33 But BANA requests additional documents from Plaintiff to "complete the  
 7 application" and further delayed the process. Compl. ¶ 34. At this point, Okada was  
 8 given a list of all documents needed to complete the application. But BANA *requested*  
 9 *more documents* on July 9, 2013, and further delayed the process. Compl. ¶ 35. Okada  
 10 sent the requested documents. Compl. ¶ 36. On July 17, 2013, BANA requests more  
 11 documents and even further delays the process. Compl. ¶ 37. Again, Okada believes he  
 12 has provided them with all required documents. Compl. ¶ 37. Of course, BANA *again*  
 13 *requests more documents* and further delays the process on July 30, 2013. BANA  
 14 indicates that this document would be the last document to complete the application and  
 15 a decision on the application would be made in two week. Compl. ¶ 38-39. Okada  
 16 submits these documents. Astoundingly, BANA service releases the loan to SPS further  
 17 delaying the process and obviating itself from the NMSP application. Compl. ¶ 41.  
 18 Because BANA and SPS consistently delayed Okada's application, the NMSP expired  
 19 greatly damaging Okada's opportunity to receive hundreds of thousands of dollars in  
 20 reduced principal. Compl. ¶ 61-63. Contrary to BANA's claim, Okada fully lays out  
 21 numerous factual details to support his intentional and negligent misrepresentation  
 22 claims.

23 **3. As a matter of law, BANA owed Okada a duty of care in processing his**  
 24 **loan modification application.**

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*See BANA's Motion to Dismiss P. 8 Lines 11-13*

1 While BANA is correct in asserting generally that lenders do not owe a duty of  
 2 care to borrowers, BANA fails to mention that this finding is not a hard and fast rule.  
 3 Several courts have concluded that financial institutions exceed their role as a money  
 4 lenders once it accepts an application for a loan modification and is thus subject to a  
 5 standard of reasonable care in handling the application.<sup>17</sup>

6 In California, the test for determining whether a financial institution exceeded its  
 7 role as money lender and thus owes a duty of care to a borrower-client involves “the  
 8 balancing of various factors, among which are: (1) the extent to which the transaction  
 9 was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree  
 10 of certainty that the plaintiff suffered injury, (4) the closeness of the connection between  
 11 the defendant's conduct and the injury suffered, (5) the moral blame attached to the  
 12 defendant's conduct, and (6) the policy of preventing future harm.” *See Nymark v. Heart*  
 13 *Fed. Sav. & Loan Ass'n*, 231 Cal. App. 3d 1089, 1098 (1991).

14 In *Bowman v. Wells Fargo Home Mortg.*, 2014 U.S. Dist. Lexis 65806\* 20-21 (N.D.  
 15 Cal. May 13, 2014), the court found that Wells Fargo owed Plaintiff Bowman a duty of  
 16 care stating that “five of the six factors weigh in Plaintiff’s favor.” The facts in *Bowman*  
 17 are almost identical to Okada in that the delays and misrepresentations caused by all  
 18 Defendants in the action contributed to Okada’s lost opportunity to obtain a loan  
 19 modification – especially the NMSP where Okada possessed an opportunity to reduce  
 20 the principal on his loan by hundreds of thousands of dollars.

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*See Garcia v. Ocwen Loan Serv., LLC*, 2010 U.S. Dist. LEXIS 45375 at \*3 (N.D. Cal. May 10, 2010); *Trant v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 98404, at \*6-7 (S.D. Cal. July 12, 2012); *Ansanelli v. JPMorgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 32350 at \*7 (N.D. Cal. Sep. 11, 2013); *Avila v. Wells Fargo Bank*, 2012 U.S. Dist. LEXIS 100522, at \*12-\*14 (N.D. Cal. July 19, 2012); *Chancellor v. OneWest Bank*, 2012 U.S. Dist. LEXIS 71992, \*13-14 (N.D. Cal. May 22, 2012)

1 Thus, a weighing of the California duty of care factors warrants a finding that  
 2 BANA owed Okada a duty of care in reviewing Okada under the NMSP.

3 **4. Okada’s lost opportunity to obtain the NMSP satisfies the False Promise**  
 4 **and Negligent Misrepresentation damage requirement.**

5 BANA relies on *Stephenson v. Argonaut Ins. Co.* 125 Cal App. 4<sup>th</sup> 962, 974-975  
 6 (2004) to establish the proposition that intentional and negligent misrepresentation  
 7 claims require a “**resultant hard dollar loss.**” But review of *Stephenson* reveals that it  
 8 does not stand for this proposition. Indeed, *Stephenson*’s holding leaves the door open  
 9 for damages other than “hard dollar losses.” The *Stephenson* court writes, “**Whatever**  
 10 **form it takes,** the injury or damage must not only be distinctly alleged but its causal  
 11 connection with the reliance on the representation must be shown and the damage which  
 12 follows must be complained of with a legal certainty.” *Id.* at 974-975.

13 Indeed, the court in *Bowman v. Wells Fargo Home Mortg.* At 20-21 held that  
 14 despite no guarantee of a modification being granted, losing the opportunity to obtain a  
 15 loan modification through a servicers mishandling of documents creates an injury to  
 16 homeowners that is legally certain.

17 The *Bowman* court also noted at 20-21:

18 “The potential harm to Plaintiff from mishandling the application  
 19 processing was also foreseeable: the loss of an opportunity to keep her  
 20 home was the inevitable outcome. Although there was no guarantee the  
 21 modification would be granted, Plaintiff alleges that the mishandling of the  
 22 documents deprived her of the possibility of obtaining the requested relief.  
 23 The injury to Plaintiff is certain, in that she lost the opportunity to modify  
 24 her loan. There is also a close connection between Wells Fargo's conduct  
 25 and any injury actually suffered, because, to the extent Plaintiff otherwise  
 26 qualified and would have been granted a modification, Wells Fargo's

1           alleged conduct precluded the loan modification application from being  
2           properly processed.”

3           Like *Bowman*, Okada engaged in modification discussions with BANA. BANA  
4           led Okada to believe that they would review him for the NMSP and assured Okada that  
5           they would not engage in foreclosure proceedings provided that Okada was in  
6           modification discussions. BANA sent Okada conflicting accounts of the status of  
7           Okada’s application – even remarking falsely that Okada withdrew his NMSP  
8           application. See Compl. ¶ 31-32. In fact, Okada’s damages are more certain than the  
9           facts in *Bowman* because the delay in processing Okada’s NMSP application allowed the  
10          NMSP to expire without review. See Compl. ¶ 55 Okada can no longer obtain an  
11          NMSP modification and principal reduction on his loan.

12           **B. Okada’s complaint adequately alleges violations of California Civil Code**  
13          **Sections 2923.6, 2924.10, and 2924.18.**

14          Okada adequately alleges submission of a “complete application” throughout his  
15          complaint, but essentially BANA asserts that it never received a complete application  
16          and was not being reviewed for a modification, well..... because BANA said so.  
17          BANA’s self-serving definition of a “complete application” taken on its face would  
18          render the protection of the Homeowners' Bill of Rights toothless. Okada concedes the  
19          need to update records and clarify questions once a “complete application” is provided.  
20          But to insinuate Okada waited “nearly one year prior to any purported modification  
21          application” is completely misleading.<sup>18</sup>

22          BANA quickly point out the “inconsistencies” in Plaintiff’s complaint, but the  
23          “inconsistencies” reflect BANA’s representations to Plaintiff. BANA’s claim that Okada  
24          never submitted a “complete application” is at best a question of fact not law. BANA’s

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See p. 11 of BANA’s Motion to Dismiss lines 26-27

definition of a “complete application” would renders Civil Code § 2923.6 toothless.

Finally, when BANA assures Okada that one more document completes the application, *BANA service releases his loan to SPS*. BANA now contends that it obviated itself from Homeowner’s Bill of Right scrutiny. At worst, a question of fact remains as to whether BANA forwarded the NMSP application to SPS.

Since its offer to review Okada under the NMSP, BANA consistently misrepresented the state of Okada’s NMSP application and denied Okada a meaningful opportunity to obtain a loan modification. BANA’s sudden servicing transfer *bolsters the argument that BANA never intended to review Okada under the NMSP*.

Furthermore, BANA’s service releasing the NMSP application violates Ca. Civ. Code 2923.7’s requirement that BANA provide a single point of contact responsible for “communicating, coordinating, providing access to all current information and ensuring that Okada is considered for a modification.” See Ca. Civ. Code §2923.7. Okada requests leave to amend the complaint and add violation of Ca. Civ. Code § 2923.7 against BANA.

**C. Plaintiff adequately alleges an actionable claim for violation of the UCL against BANA.**

Plaintiffs' seventh claim is for unfair competition in violation of California's UCL, Cal. Bus. & Prof. Code § 17200. The UCL prohibits any “unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. “Since section 17200 is written in the disjunctive, it establishes three separate types of unfair competition. The statute prohibits practices that are either 'unfair' or 'unlawful,' or 'fraudulent.’”<sup>19</sup> To support a claim for a violation of the UCL, a plaintiff cannot simply rely on general common law principles.<sup>20</sup>

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<sup>19</sup>

*Pastoria v. Nationwide Ins.*, 112 Cal. App. 4<sup>th</sup> 1490, 1496 (Ca. 4<sup>th</sup> 2003)

<sup>20</sup>

1 The UCL incorporates other laws and treats violations of those laws as unlawful  
 2 business practices independently actionable under state law.<sup>21</sup> Violation of almost any  
 3 federal, state or local law may serve as the basis for a UCL claim.<sup>22</sup> In addition, a  
 4 business practice may be “unfair or fraudulent in violation of the UCL even if the  
 5 practice does not violate any law.”<sup>23</sup>

6 **1. Okada’s complaint adequately alleges injury to satisfy the UCL’s standing**  
 7 **requirement.**

8 Courts have held that the sorts of wrongs that Okada alleges constitute “economic  
 9 injury” sufficient to yield a viable UCL claim. The California Supreme Court in *Kwikset*  
 10 *Corp. v. Superior Court*, 51 Cal. 4<sup>th</sup> 310, 323 (Cal. 2011), defined the “Economic Injury”  
 11 prong in establishing standing under the UCL:

12 “there are innumerable ways in which economic injury from unfair competition  
 13 may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a  
 14 transaction less, than he or she would otherwise have; (2) have a present or future  
 15 property interest diminished; (3) be deprived of money or property to which he or  
 16 she would otherwise have or (4) be required to enter into a transaction costing  
 17 money or property that would otherwise be unnecessary.”

18 The court in *Segura v. Wells Fargo Bank*, relying on *Kwikset* held that a plaintiff  
 19 had “plainly” suffered economic injury, and thus had an actionable UCL claim, from a

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*Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 118 Cal. App. 4<sup>th</sup>  
 1061, 1072, (Ca. 4<sup>th</sup> 2004)

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*Chabner v. United Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9<sup>th</sup> Cir. 2000)

22

*Saunders v. Superior Court*, 27 Cal. App. 4<sup>th</sup> 832, 838-39, 33 Cal. Rptr. 2d 438  
 (Cal. App. 1994)

23

*Olszewski v. Scripps Health*, 30 Cal. 4<sup>th</sup> 798, 827, 135 Cal. Rptr. 2d 1, 69 P.3d  
 927 (Cal. 2003)

1 lost opportunity to obtain “lower monthly mortgage payments” through a loan  
 2 modification. 2014 U.S. Dist. LEXIS 143038, 2014 WL 4798890 at \*9. The *Segura*  
 3 court even held that “miscalculating Plaintiffs’ eligibility for loan modification  
 4 programs” would alone suffice to state a UCL claim. 2014 U.S. Dist. LEXIS 143038, at  
 5 \*9. “No more is needed to state a claim,” the Honorable Michael W. Fitzgerald wrote  
 6 for the court. *Id.*

7 The numerous detailed facts presented by Okada adequately provide a detailed  
 8 picture of BANA’s representations and misrepresentations which led to Okada’s lost  
 9 opportunity to avail of the NMSP modification. The lost opportunity to obtain principal  
 10 reduction under the NMSP due to BANA’s delays and loan servicing transfer to SPS  
 11 without providing SPS the NMSP application constitutes “economic injury” which  
 12 satisfy the UCL’s standing requirements.

13 **2. Okada establishes standing under the UCL by adequately pleading**  
 14 **“actionable conduct.”**

15 “To state a cause of action based on an unlawful business act or practice under the  
 16 UCL, a plaintiff must allege facts sufficient to show a violation of some underlying  
 17 law.”<sup>24</sup> In addition, a plaintiff may also establish standing where the alleged business  
 18 practice “is immoral, unethical, oppressive, unscrupulous or substantially injurious to  
 19 consumers and requires the court to weigh the utility of the defendant’s conduct against  
 20 the gravity of the harm to the alleged victim.” *Id.*

21 Okada’s complaint adequately alleges BANA violates several provision of the  
 22 Homeowner’s Bill of Rights. Okada, with sufficient detail, adequately pleads that all  
 23 defendants violated Civil Code §§ 2923.6, 2924.10, 2924.18. Furthermore, Okada

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*Cruz v. Aurora Loan Servs., LLC* 2015 U.S. Dist. Lexis 58891, \*28 (N.D. Cal. May 5, 2015)

alleges that both BANA and SPS’ delay in reviewing Okada under the NMSP subsequently led to the expiration of the NMSP. Because the NMSP expired, Okada lost a valuable opportunity to obtain principal reduction on his home. Thus, Okada’s complaint establishes standing to sue under the UCL because Okada satisfies the UCL’s “actionable conduct” requirement.<sup>25</sup>

# **CONCLUSION**

Okada has alleged sufficient facts to support his claims against Defendants. For the reasons set forth above, Plaintiff hereby respectfully requests that the Court deny Defendants’ Motion to Dismiss, or if the Court grants BANA’s Motion to Dismiss, permit Okada with leave to amend.

Dated: July 12, 2015

MANASAN LAW GROUP, PC,

s/RSM

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<sup>25</sup>

*Id.* at 24-25